UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 19

ROSEBURG FOREST PRODUCTS CO.,

Employer,

And **Case 19-CA-213306**

CARPENTERS INDUSTRIAL COUNCIL

(CIC) Local Union No. 2949,

Union.

CARPENTERS INDUSTRIAL COUNCIL (CIC)

Local Union No. 2949's CLOSING BRIEF.

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I. Background

Nicholas Miller has been employed by Roseburg Forest Products, Co. ("Employer") for fourteen years. (Tr. 8:18). Pursuant to a Collective Bargaining Agreement ("CBA"), Mr. Miller is a member of the Carpenters Industrial Council Local Union No. 2949 ("Union"). On September 5, 2017, Mr. Miller posted a comment on the Union's private Facebook page pertaining to the working conditions of the Employer's plant. Specifically, Mr. Miller stated, "Apparently, closing all of the doors and windows will help keep the smoke out of the plant even though the plant isn't sealed and there isn't a filtration system. This is the level of stupidity that our management team has elevated to." (Tr. 8:21-9:1). Mr. Miller had posted this Facebook comment after having already spoken with management personnel about his concern. (Tr. 9:2-9; *see also* Tr. 16:22-25). His Facebook comment was followed by support from Mr. Miller's coworkers. Id.

The following day, September 6, 2017, Mr. Miller was required by management to attend an investigatory meeting about his Facebook post and was suspended and subsequently terminated on September 8, 2017. (Tr. 9:18-19). The Employer claims the suspension and subsequent termination were due to Mr. Miller's behavior during the September 6, 2017 investigatory meeting regarding the Facebook post. (Tr. 9:14-21). However, as discussed herein, nothing Mr. Miller said or did at the investigatory meeting caused him to lose the protection of the Act. Any contentions the Employer makes regarding this or other alleged reasons for the termination are merely pretext. The Employer's suspension and termination of Mr. Miller violate the Act because they were taken in retaliation for Mr. Miller's protected concerted activity.

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II. Legal Standard

The Board's decision in *Atlantic Steel* 245 NLRB 814 (1979) sets forth the applicable principles where the Employer alleges an employee's concerted activity has lost the protection of the Act. As explained in *Atlantic Steel,* the Board looks at four factors to determine whether or not the employee's activity is still protected. Those factors are: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Id*. at 816.

III. Relevant Facts

In the late summer of 2017 forest fires affected the air quality in and around the vicinity of the Employer's plant. (Tr. 21:22-22:2). The Employer decided to close the doors of the Plant in an effort to limit the amount of smoke seeping into the Plant. (Tr. 65:7-24), On September 5, 2017, the outside temperature ranged from a low of 65 degrees and a high of 92 degrees. (TR 271:3-13). On September 5, 2017, Nicholas Miller spoke with his superior Ken Miller about his concern that shutting the doors made the plant hotter – creating an additional safety concern - and did not alleviate the poor quality due to the smoke filling the Plant. (Tr. 66:14-67:1-7). During the hearing, Mr. Miller testified that he had done an informal study a few years prior regarding the impact of closing or opening the doors to the Plant and its impact on the Plant's internal temperatures. (Tr. 55:9-56:24). The impact was significant in the summer months – causing the temperature in the Plant to drop by 5-10 degrees if the doors were open. (TR 56:15-17). Mr. Miller posted later that morning to the Union's private Facebook page about his concerns. (Tr. 69:5-14). The Employer talked to employees during their lunch break to inform them they could go home if they felt sick and to explain why they had shut the doors to the plant. (Tr. 23:2-6; TR 68:4-9). Mr. Miller's comments had already been posted to the Facebook page by the time of this meeting. (TR:69:11-

14). He recalled nothing specific about the lunch talk other than that employees could go home if they felt sick from the smoke. (TR 67:16-68:13). Mr. Miller was trying to eat his lunch during the talk because it was his lunch break. *Id*. The talk was approximately 5 or 10 minutes long. *Id*.

The Facebook page to which Mr. Miller posted his comment was a private, closed page set up and administered by the Union. (Tr. 16:22-17:2) Only union members are supposed to be able to access this site. (Tr. 16:12- 17:20). Therefore, when Mr. Miller posted his comment to Facebook, not only was he commenting amongst fellow coworkers, but he was also reporting concerns about the Employer's working conditions to his Union.

The day after Mr. Miller posted his comment to the Union's private Facebook page, the Employer demanded Mr. Miller attend an investigatory meeting which an unusual number of supervisors attended. (Tr. 26:1-23). There were at least seven supervisors present, while only the Union Shop Steward and Mr. Miller were present to represent Mr. Miller's interests. (Tr. 195:1-3). At the very start of the meeting, supervisor Deneen Dahl's voice was raised. (Tr. 27:9-11). Both Ms. Dahl and another supervisor, Tris Thayer, asked Mr. Miller why he posted his Facebook comment, to which he maintained that it was "the way he felt." (Tr. 27:4-28:2; TR 75:11-16). After being questioned further, management personnel caucused, and upon their return, informed Mr. Miller that they were suspending him. (Tr. 28:3-19). The Employer did not inform Mr. Miller why he was being suspended. (Tr. 28:22-24; Tr. 77:9-14). The only issue raised by the Employer was Mr. Miller's Facebook post about the smoke and heat in the plant. (Tr. 75:19-76:13). Discussion ensued about whether the decision by management to close the doors was appropriate; Mr. Miller maintained that it created a separate problem of heat. *Id*.

The Employer did not indicate that Mr. Miller was acting inappropriately during this meeting. (Tr. 28:25 to Tr. 29:2). Although Mr. Miller interrupted Ms. Dahl once during the

meeting, he did not use profanity or threaten anyone. (Tr. 29:3-10). Ms. Dahl had also interrupted Mr. Miller during this meeting. (Tr. 29:13-15). The Employer contends that Mr. Miller called the management team "a bunch of idiots" during this meeting; however, this contention conflicts with the testimony of both union shop steward Edward Weakley and Mr. Miller. (Tr. 141:13-14; Tr. 36:1-3; Tr. 87:15-21).

At the close of the September 6, 2017 investigatory meeting, Mr. Miller was told he was being suspended "pending investigation," and yet no evidence at the hearing indicated any additional investigation was performed. (Tr. 92:3-4; Tr. 145:25-146:1; Tr. 231:10). General Manager Anthony Ramm explained that the management team reviewed Mr. Miller's employment history and claimed it showed Mr. Miller "had difficulties in following instructions and treating people respectfully." (Tr. 234:12-13). But Mr. Ramm failed to cite to any new incident that would have warranted any discipline whatsoever other than Mr. Miller's Facebook post and his responses to questions during the September 6, 2018 meeting.

Two days later, Mr. Thayer called Mr. Miller and informed him that the Employer was terminating him. (Tr. 78:3-6). During this phone call, Mr. Thayer did not provide Mr. Miller with a reason for the termination, although Mr. Miller assumed it was because of his Facebook post. (Tr. 78:5-16; 88:11-17). Mr. Miller did not receive written notice of the termination with any reason described until a Step 2 grievance meeting sometime in October 2017. (Tr. 89:22-90:14). The Employer's written notice stated that he was terminated due to "Violation of Company Loyalty." (Exhibit 5).

Mr. Thayer claimed that Mr. Miller was suspended "because of his comments and actions during that [September 6, 2017] meeting…" (Tr. 199:12-13). Plant manager Anthony Ramm claimed the ultimate decision "…was for that repeated pattern behavior that we saw where Nick

had difficulties in following instructions and treating people respectfully." (Tr. 234:11-13). This testimony conflicts with the Employer's own documented reason "Violation of Company Loyalty" for Mr. Miller's termination. The termination notice was a simple form with checkboxes in which the Employer had a number of options it could have checked off, including "communication issues," and "violation of company policies," but instead the Employer chose to terminate Mr. Miller solely for an alleged "violation of company loyalty." (Tr. 246:2-5; Exhibit 5).

IV. Legal Argument

A. Protected Concerted Activity and the High Standard Required to Lose the Protection of the Act.

As stated above, the applicable legal standard is set forth in *Atlantic Steel*. Since then, the Board has continued to uphold and further define this standard throughout the years. Recently, in *Plaza Auto Center, Inc*., the Board looked at an employee's language and analyzed whether such language "solely involved obscene and denigrating remarks that constituted insubordination or whether it also was menacing, physically aggressive, or belligerent." 360 NLRB 972 at 974, 199 LRRM 1523 (2014). In that case, an employee had repeatedly raised concerns during regular sales meetings about various employer policies, including compensation solely by commission, lack of breaks, and employees being financially responsible for damage that they did not cause. Raising such concerns is clearly protected under the Act. After the employee informed fellow coworkers that they were entitled to a base minimum wage, a supervisor called the employee into an office meeting with several supervisory personnel. During this meeting, a supervisor informed the employee that his behavior "would negatively affect the sales force and that he was asking too many questions." *Id*. at 973. In response to this, the employee raised his voice and used profanity, even calling one of the supervisors "a fucking crook," and an "asshole." *Id*. At the end of this meeting, the employer fired the employee. *Id*.

To decide whether the employee's behavior was so extreme as to lose the protection of the Act, the Board looked to "settled precedent [which] tasks the Board with 'using an objective standard,' rather than a subjective standard, to determine whether challenged conduct is threatening." *Id*. citing *Kiewit Power Constructors Co. v. NLRB,* 652 F.3d 22, fn.2 (D.C. Cir. 2011).

> The NLRB examined the record here and determined that the 'single, brief, and spontaneous reactions by' Judd and Bond were not physical threats, but only expressed vocal resistance to a policy they thought was unfair and unsafe." *Kiewit Power Constructors Co.,* 355 N.L.R.B. No. 150, at *3. The absence of any physical gestures or other reasons to think Judd and Bond were threatening actual violence supports that view. Given our narrow standard of review, we have no warrant for reversing the NLRB's determination that Judd and Bond were doing nothing more than disagreeing vehemently with Kiewit's policy.

Kiewit, 652 F.3d at 20. Ultimately, following the analysis laid out in *Kiewit*, the *Plaza Auto Center* Board ruled that the use of profanity by the employee did not cause him to lose the protection of the Act because the conduct in question, when "viewed objectively, was not menacing, physically aggressive, or belligerent." *Id*. at 976. The same result should be reached in this case – viewed objectively there is simply nothing that occurred during the meeting that would have caused Mr. Miller to lose the protection of the Act.

In this matter, there are at least two incidents of protected concerted activity. The first was the Facebook post itself. The second was Mr. Miller's statements during the September 6, 2018 meeting defending the post and discussing the fire and smoke issues at the Plant. In effect, Mr. Miller's behavior during the September 6, 2018 meeting was merely an extension of his Facebook post in which he did not offer an apology regarding his opinion of management's decision to close the Plant doors.

There was some conflicting testimony regarding exactly what Mr. Miller said during the September 6, 2017 investigatory meeting. Nevertheless, even if he stated that management was "a

bunch of idiots" for closing the doors, as the Employer alleges, that statement does not rise to a level of being objectively menacing, physically aggressive, or belligerent. Instead, it appears as though management simply felt offended that Mr. Miller was criticizing how they addressed the poor air quality, and in retaliation for that criticism and Mr. Miller's concerns about workplace safety, chose to suspend and subsequently terminate him. None of management's testimony indicated any menacing, physically aggressive, or belligerent behavior during the meeting. Instead, Ms. Dahl, the current Human Resources Manager and former Safety Manager, testified Mr. Miller called the management team "idiots" and that he mentioned previous safety concerns. (See generally Tr. 142-143). She also testified that Mr. Miller had raised his voice at a certain point in the conversation and said she perceived that his body language "showed that he was frustrated." (Tr. 143:12-13; Tr. 145:16-17). Again, there is nothing indicating threats, menacing behavior or other actions that would cause an employee to lose protection of the Act. If anything, Mr. Miller's behavior sounds like that of an exasperated employee who has been facing poor physical working conditions and is being questioned about why he raised it on the union's Facebook page. None of this testimony demonstrated any behavior that warranted loss of protection of the Act and none of it is unreasonable given the totality of the circumstances.

After prompting from the Employer's counsel, Ms. Dahl also claimed, "During that meeting we were unable to calm Nick down. And when you start to see that at some point, the concern is that the people can certainly get violent." (Tr. 150:8-11). However, neither Ms. Dahl nor any other witness provided objective evidence that Mr. Miller was acting aggressively, violently or in a threatening manner. There was also no history of violent behavior on behalf of Mr. Miller, or any other basis for making such a statement in her testimony. When the Administrative Law Judge requested Ms. Dahl describe Mr. Miller's state, Ms. Dahl responded,

"He had his arms folded and his face was red. Tilted way back in his chair. Just his body language showed he was frustrated." (Tr. 145:15-17). Nothing in her or any other Employer's witnesses' testimony indicated that there was an actual concern of violence during the September 6 meeting. Instead, it appears that the Employer is retaliating against Mr. Miller for his legitimate criticism of the Employer's approach to safety. This manufactured concern about workplace violence is a weak attempt to justify the Employer's unlawful termination of Mr. Miller for making comments that they did not like on the union's Facebook page and his failure to apologize for them.

Testimony of Employer's former Human Resources Supervisor Tris Thayer further supports the Union's contention that Mr. Miller retained the protection of the Act and that the Employer's contentions to the contrary are pretextual. Mr. Thayer testified that Mr. Miller was "[f]rustrated, agitated, verbose." (Tr. 198:11). None of these descriptors indicate menacing, aggressive, or belligerent behavior. Further, Mr. Thayer admitted Mr. Miller was not violent during the meeting, nor did he use profanity. (Tr. 219:22-25 to Tr. 220:1-2). Instead, Mr. Thayer claimed Mr. Miller had used the words "idiot" and "dumb," but admitted that he had never suspended anyone for using this type of language. (Tr. 220:3-24).

Even if Mr. Miller's comments at the September 6th investigatory meeting about his Facebook post are determined to be insubordinate, the Board in *Plaza Auto* and other cases has held that even if the employee's outbursts "constituted insubordination," the fact-finder must still assess whether or not such behavior cost the employee the protection of the Act under *Atlantic Steel*. *Id*. at 977. Even if the third factor – the nature of the outburst – weighs against the employee, the other three factors may weigh in the employee's favor and thus permit him to retain the protection of the Act. *See e.g. Kiewit Power Constructors Co. v. NLRB*, 652 F.3d at 27, fn. 1 (D.C. Cir. 2011).

As a result, there is no requirement that all four *Atlantic Steel* factors must weigh in the employee's favor. Rather, the factors are to be weighed to determine whether or not the employee should still receive the protection of the Act. As described above, Mr. Miller's actions were not threatening therefore the *Atlantic Steel* factors must be weighed next.

1. Factor One - The Place of the Discussion

As described above, Mr. Miller engaged in protected concerted activity on two occasions – his Facebook post and the investigatory meeting about the post. There is no dispute that Mr. Miller's original comment was posted on the Union's private Facebook page. Mr. Miller's subsequent comments during the September 6, 2017 meeting took place in the Employer's HR office. (TR: 25:17-18). Comments critical of management in two private forums do not cause an employee to lose the protection of the Act.

Even if Mr. Miller's Facebook comment had not been on a private page, caselaw has upheld similar social media posts as protected concerted activity. As recently as July 2018, the Board found an Employer's termination to be unlawful after it determined that the Employer terminated him for his Facebook post, not for the pretextual reason put forth by the Employer. *North West Rural Electric Cooperative*, 18–CA–150605, 366 NLRB 132 (2018). The Employer claimed it terminated the employee not for his Facebook post, but "for his continued bad attitude, negative comments toward our organization and his fellow employees, and the concerns that have been raised of our linemen not wanting to work with him." *North West Rural Electric Cooperative*, at *11. The employee had posted a lengthy Facebook comment in response to a comment from another worker in his industry regarding an increase in workplace accidents and deaths in recent years. The employee's lengthy comment referred to apprentices not getting sufficient training time and stated that when he would bring the issue up with management, he "would get lip back." *Id.*

at 8. He further stated that regardless of how much he would bring it up with management, "nothing gets done." *Id*. Similar to the current matter, the Employer in *North West Rural Electric Cooperative* claimed they had terminated the employee for a pattern of negative behavior, and not for his Facebook post. Nevertheless, the Board found that the Facebook post was the main reason for termination because the Employer's testimony was not supported by the record. *Id*. at 12. It held that the employee's testimony was more credible and that his post was protected concerted activity that had not lost the protection of the Act. *Id*. at 17. The same result should be reached here where the Employer's proffered reason for the termination at the hearing does not match the reason articulated at the time of the termination "violation of company loyalty" or the objective facts – that Mr. Miller was questioned at the meeting solely about his Facebook post and safety concerns and that the supervisors at the meeting were upset about the post and his portrayal of management as stupid in the post.

The discussion on September 6, 2017 took place in the confines of the Employer's HR office. There were at least seven supervisors present. It is objectively reasonable for an employee to feel threatened and to become frustrated. Ms. Dahl testified that she'd had discussions with other employees regarding their Facebook posts, but in none of those meetings were multiple management personnel present. In fact, these other meetings about Facebook posts generally consisted of Ms. Dahl simply mentioning the post to the employee in what appeared to be an informal discussion with either one other manager present or simply Ms. Dahl as the lone manager. (See generally Tr. 121-134 and Tr. 167-168). In one such incident, Ms. Dahl even referred to the meeting as a "personal conversation." (Tr. 168:14).

The caselaw is clear that commenting in a social media forum does not remove the protection of the Act. Further, the private meeting in the Employer's HR office is also not a

location that would cause a loss of protection of the Act. While Mr. Miller was described as being "frustrated" during the meeting and may have even described management as "idiots" or "dumb" for shutting the doors in the heat (depending on whose testimony is believed), given the private nature of the meeting, the excessive number of management personnel present and the raised voices of at least one manager (Ms. Dahl) from the outset, the first factor – place of the discussion – falls squarely in Mr. Miller's favor. If anything, the location of Mr. Miller's comments during this meeting could have been a cause of provocation, which will be analyzed in more detail under the fourth *Atlantic Steel* factor below.

2. Factor Two - The Subject Matter of the Discussion

The subject matter of Mr. Miller's Facebook comment was due to the poor ventilation and air quality at the Employer's facility, which was severely impacted by recent forest fires in the vicinity and the fact that shutting the plant doors created an additional safety concern by raising the temperature of the Plant. The investigatory meeting that took place during the September 6, 2017 meeting was solely based on Mr. Miller's Facebook post. (Tr. 76:2-13). As a result, Mr. Miller's comments during this meeting were a mere extension of his Facebook post. At least two managers asked him why he had written such a post. (Tr. 27:4-5; Tr. 27:19-25). Further, Ms. Dahl testified that she had requested to have the meeting with Mr. Miller, "because [of] Nick Miller's Facebook post…" (Tr. 151:5-12). In short, this meeting was for the purpose interrogating Mr. Miller about his protected concerted activity.

During the meeting, Miller explained that his purpose in writing the post was to express his frustration at the decision to close the doors because it did not solve the smoke issue and it added to the heat of the Plant, creating another safety issue. There was some back and forth at the meeting with Ms. Dahl because she was frustrated he had posted this even though he had acknowledged

during the lunch meeting that there were not any good solutions. (Tr. 140:12-141:14). However, by the time that lunch meeting had occurred, Mr. Miller had already posted his comment to the union's Facebook page.

The Board in *North West Rural Electric Cooperative* reviewed the intention of protecting concerted activity and stated, "that the concept of 'mutual aid and protection' concerns '…the goal of concerted activity; chiefly, whether the employee or employees involved are seeking 'to improve terms and conditions of employment or otherwise improve their lot as employees." *Id*. at 12, citing *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). Similar to the current matter, the Board found that the terminated employee had already previously raised his concerns with management, and that the Facebook comment was simply a "continuation" of those concerns that had been previously expressed. *Id*. Further, the Board reiterated the Supreme Court's decision in *Eastex, Inc. v. NLRB*, in which the Court "held that attempts to improve the terms and conditions of employment for other employer's employees are within the broader purpose of 'mutual aid or protection' under the Act…" *Id*. citing *Eastex Inc. v. NLRB*, 437 U.S. 556 (1978). Here, it is clear that Mr. Miller's Facebook post was pertaining to the poor ventilation and increase in Plant temperature that Mr. Miller and his fellow employees were experiencing at the Plant. It is also clear that Mr. Miller was called into the HR office the following day to further discuss this same issue, and that Mr. Miller's comments during this meeting were only a continued expression of what he had already posted to Facebook. Because of this, the subject matter of Mr. Miller's comments still deserve the protection of the Act.

3. Factor Three - The Nature of the Employee's Outburst

As stated herein, there were two incidents of Mr. Miller engaging in protected concerted activity, both of which had a direct nexus to one another – the Facebook post, and Mr. Miller's

reaction during the September 6, 2017 meeting. The post itself accused management of elevating to a "level of stupidity," and Mr. Miller maintained that this was how he felt when interrogated during the September 6, 2017 meeting. After Mr. Miller's post, several coworkers posted positive comments in support of Mr. Miller. Further, even if that were not the case, protected concerted activity includes situations "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II*, 281 NLRB 882 (1986). Because Roseburg Forest Products held a meeting with employees on the very same issue, and because the Facebook post was based on Mr. Miller's concerns about the poor ventilation at the plant, there can be no doubt that this was a group complaint. As a result, it is clear that this was concerted activity.

While some of the Employer's witnesses contended that Mr. Miller's behavior was escalated, Mr. Thayer admitted that Mr. Miller was not the only one who had raised his tone during the September 6, 2017 investigatory meeting. He testified, "…[I]t was escalating and it ceased to be a constructive meeting. And – and we ended – up suspending pending so *everybody* could cool off and get back together at a later date and time." (Tr. 196:9-13)(emphasis added). Mr. Thayer did not specify what he meant when he used the word "it," but one can infer that he was likely referring to the meeting in general, and not just Mr. Miller, particularly because he stated, "so *everybody* could cool off.". Therefore, Mr. Miller's behavior appears to have been no more heated than that of management personnel who had also raised their voices and interrupted one another. There is certainly no evidence of threatening or violent behavior or statements by any party.

Atlantic Steel made it clear that criticizing management, particularly at a meeting, does not cause the employee to lose the protection of the Act. The fact that an employee's language is

inaccurate or includes profanity or disrespectful language does not remove the protective mantle of Section 7 of the Act. *Atlantic Steel* 245 NLRB at 819.

The *Atlantic Steel* test has been upheld in cases in which the employee's outburst contained language that was far more explicit than the alleged comments here, even if the Administrative Law Judge determines that Mr. Miller referred to management as "idiots" or "dumb" during the meeting. For example, in a case from July of 2018, the Board held that an employee did not lose the protection of the Act when he wrote "whore board," on his Employer's overtime signup sheets. *Constellium Rolled Products Ravenswood, LLC*, 09-CA-116410; 366 NLRB No. 131 (2018). In *Constellium Rolled Products Ravenswood, LLC*, the Board found that the term was frequently uttered by both employees and supervisors alike, and that no one had previously been disciplined for this language. *Id.* at 1. Here, the Employer claims that it does not tolerate the language that Mr. Miller used, and yet, Mr. Weakley did not support the Employer's contention that "dumb" and "idiot" are banned or no longer used at the Plant. (Tr. 33:17-34:1). In this particular instance the only forums Mr. Miller used them was (1) on the Union's closed, private Facebook page, and (2) during the September 6, 2017 investigatory meeting in the HR office when he was asked about his Facebook post.

While the Employer introduced several policies at the hearing it claimed it had implemented to promote more professionalism, there was no evidence all those policies had been disseminated to Mr. Miller or other employees nor was there any evidence of widespread training or understanding of such policies. (Tr. 166:11-167:8). Mr. Miller was unaware of some policies, including the Employer's "social media policy" and had not signed off on any of them. (Tr. 252:15-253:19). Further, Mr. Thayer admitted that he did not note any violations of policy, including the Employer's non-harassment policy, as a reason for Mr. Miller's termination. (Tr. 161:25-163:4).

The Employer claims that Mr. Miller's Facebook post was not a factor in the termination, but rather his behavior at the September 6, 2017 meeting triggered the decision to terminate him. (Tr. 237:4-6). However, both Mr. Miller's statements and behavior during the September 6, 2017 meeting and his Facebook post, were directly related to working conditions that he and his coworkers were experiencing and nothing he did at the meeting was so extreme as to cause him to lose protection of the Act.

At the hearing, the Employer also appeared to argue that Mr. Miller's employment history was a factor in his termination. However, if Mr. Miller had never posted the comments about the Employer's decision to shut all the Plant doors to the Union's Facebook page, there never would have been an investigatory meeting at all, nor a review of his employment history. Further, given the nature of the discussion at the investigatory meeting and the lack of any aggressive, threatening or violent outbursts by Mr. Miller, the Employer's contentions are without merit and are pretextual.

Testimony amongst the Employer's own witnesses was conflicting with regard to the nature of Mr. Miller's alleged "outburst." As described above, the Board has held that employees still maintained the protection of the Act after outbursts that contained language far more explicit and profane than the language Mr. Miller used, both in the Facebook post, and at the meeting. Because the testimony of Employer's own witnesses was inconsistent, an inference should be made that Mr. Miller's behavior during the meeting was merely that which is common of a frustrated employee since , as discussed above, there was no evidence that his outburst was violent in any way. His comments were clearly protected concerted activity, and the nature of Mr. Miller's "outburst" did not rise to a level that would warrant loss of protection of the Act.

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4. Factor Four-- Whether the Outburst was Provoked by the Employer's Unfair Labor Practice

In testimony, the Employer claims that the September 6, 2017 meeting was not solely to interrogate Mr. Miller regarding his protected concerted activity. But Ms. Dahl testified that she had requested to have the meeting with Mr. Miller, "because [of] Nick Miller's Facebook post…" (Tr. 151:5-12). Further, both Ms. Dahl and Mr. Thayer asked Mr. Miller about his post during this meeting. The Employer admitted that Mr. Miller seemed frustrated during the meeting, and it is reasonable to conclude that this frustration stemmed from Mr. Miller's repeated attempts to draw attention to the fact that Employer's response to the wildfires was not resolving the ventilation issue and was creating a separate safety issue by raising the Plant's temperature. It is further reasonable to conclude that this frustration provoked whatever minimal response Mr. Miller exhibited during the September 6, 2017 meeting. Such frustration under these circumstances does not destroy the protections of the Act. See, for example, *North West Rural Electric Cooperative* at 17. By holding the meeting on September 6, 2017, the Employer attempted to chill Mr. Miller's protected activity and Mr. Miller's "frustrated" behavior during the meeting was directly provoked by the Employer's Unfair Labor Practice.

V. CONCLUSION AND REMEDY REQUESTED

Testimony on behalf of the Employer was wholly inconsistent with the termination notice. Further, testimony regarding Mr. Miller's behavior during the September 6, 2017 meeting was inconsistent between Ms. Dahl and Mr. Thayer. As a result, all such testimony should be disregarded as not credible.

Even if this testimony is not stricken, the Employer never identified what Mr. Miller did at the meeting that showed he had violated "Company Loyalty" other than fail to repudiate his Facebook post about safety issues at the Plant and his disagreement with management's decision

to shut all of the doors. The Employer clearly decided that Mr. Miller "Violated Company Loyalty" by posting negative comments about a management decision on the Union's private Facebook page. When the Employer realized that such postings are protected concerted activities, it attempted to come up with pretextual reasons for the termination. These reasons are not credible and are unsupported by any of the evidence put forth by the Employer. .

Finally, Mr. Miller's behavior during the September 6th investigatory meeting did not rise to any level that would have caused him to lose the protection of the Act under *Atlantic Steel* or its progeny. Therefore, the suspension and termination of Mr. Miller violated the Act.

The Union requests that the Employer be required to reinstate Mr. Miller's employment, make Mr. Miller whole for all lost wages and benefits, make Mr. Miller whole for all search for work expenses, make Mr. Miller whole for all reasonable consequential damages as a result of Employer's unlawful actions including any out of pocket medical expenses, and any other relief the Board deems appropriate.

DATED this 3rd day of October, 2018.

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